Filed 5/17/10 In re K.B. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.B., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.T., et al., Defendants and Respondents, K.B., Appellant.	E049786 (Super.Ct.No. J225773) OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Appellant.

Ruth E. Stringer, County Counsel and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

Lisa A. DiGrazia, under appointment by the Court of Appeal, for Defendant and Respondent A.T. (mother).

Merrill Lee Toole, under appointment by the Court of Appeal, Defendant and Respondent D.B. (father).

Counsel/guardian ad litem for K.B., the child at issue here, appeals from the juvenile court's order of November 12, 2009, continuing reunification services to her parents for an additional six months. K.B. argues the juvenile court abused its discretion when it found that there was a substantial probability that she could be returned to her parents within twelve months from removal. As discussed below, we conclude that the juvenile court acted within its discretion because it was in K.B.'s best interest to postpone termination of reunification services and setting a permanency planning hearing under Welfare and Institutions Code section 366.26.[1] We come to this conclusion, as did the juvenile court, based on K.B.'s recent change in placement and unresolved medical and developmental issues and their effects on her potential adoptability at the time of the six-month hearing.

[1] All section references are to the Welfare and Institutions Code unless otherwise indicated.

FACTS AND PROCEDURE

K.B. was born at home in February 2009. She was seven weeks premature, weighed four pounds nine ounces and tested positive for cocaine. K.B. was born with a cleft palate. In 2003, mother had given birth to a son while in prison in Indiana for burglary and conspiracy. The child was born with fetal alcohol syndrome and tested positive for marijuana at birth. Mother was not offered reunification services for the boy because her prison term went beyond the reunification period. In 2005 mother gave birth to a drug-positive daughter at 28 weeks. Mother was not offered reunification services for the girl, at least in part because she had been extradited to Illinois on a parole violation.

The detention hearing for K.B. was held on February 18, 2009. The parents were given monitored visits, twice-weekly for one hour. Both parents tested positive for cocaine a few days after K.B.'s birth.

The San Bernardino County Department of Children and Family Services (DCFS) initially recommended reunification services for father, but not for mother. After mediation, DCFS agreed to services for both parents. At the jurisdiction and disposition settlement conference held on April 2, 2009, the juvenile court found that K.B. came under section 300, subdivisions (b) and (j) (failure to protect and abuse of sibling). The court also granted reunification services to both parents, along with twice-weekly monitored visits and authority for the social worker to liberalize visits.

In the status review report prepared on September 10, 2009, for the six-month review hearing set for October 1, 2009, DCFS recommended continuing reunification

services for both parents. The parents had participated minimally in their services and had tested positive for drugs numerous times. However, the parents were "actively engaged" in the visitation aspect of the plan, and consistently visited with K.B., held her, fed her, and were affectionate with her. As the parents had requested, visits were changed to once per week for two hours, rather than twice per week for one hour. Mother was three months pregnant with another child, although she continued to use drugs. The parents were present on September 2 when K.B. had her surgery to repair the cleft palate, although the surgery could be only partially completed because K.B. had a cold. Tubes were placed in K.B.'s ears and the palate surgery was to be rescheduled.

K.B.'s counsel asked that the hearing be set contested regarding the recommendation of continued reunification services for the parents. The contested six-month review hearing was held on November 12, 2009.[2] The social worker testified that K.B. was moved on October 30 to a new medically-fragile foster home because her previous foster mother was having "some personal problems . . . in her own family." K.B. still needed surgery for her cleft palate, but was progressing developmentally.

Regarding the parents, the social worker testified that she had no proof that they had completed any of their case plan, and that when they did test for drugs, they tested positive. She testified that, after K.B.'s surgery, the parents' visits had become less

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[2] The court stated its tentative ruling at the beginning of the hearing as follows: "The [c]ourt's tentative is to go with the recommendation in that hope springs eternal, I guess. I know that probably isn't the appropriate finding, but the Court is still inclined to follow that recommendation at this juncture. Given the medical condition of the child, and additional time the child would require to get to its normal state, an additional six months to Mom and Dad, I don't think is unreasonable."

regular. The social worker stated that her previous recommendation of continued services had been based solely on the parents' consistent visits with K.B. The social worker changed her recommendation and stated she would recommend discontinuing services.

After this testimony, counsel for K.B. argued that there was no likelihood that the parents would complete their case plan within six months, and that K.B. was adoptable but that they would "need to get that moving as quickly as possible." County counsel submitted "on the social worker's recommendation" and counsel for each parent submitted "on the original recommendation." After argument, the juvenile court emphasized that the child "[h]as special needs and was just moved." The court concluded that, "There is a compelling reason not to order the parental rights of Mother and Father terminated at this time in that reunification with Mother and Father remains a substantial probability, and is in the child's best interest." The court then continued visitation as before and set the 12-month review hearing for May 12, 2010. K.B.'s counsel/guardian ad litem filed a timely notice of appeal on K.B.'s behalf.

DISCUSSION

Counsel for K.B. argues that the juvenile court was required to find a substantial probability that K.B. could be returned to the parents by the 12-month hearing before it could grant them additional reunification services, and that the court abused its discretion when it made this finding. As discussed below, at the six-month hearing the court may grant additional reunification services even without the substantial probability finding.

Further, we find that the court served the best interest of the child when it extended the services and declined to immediately set the section 366.26 hearing.

In *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166 (*M.V.*) the appellate court makes it clear that, at the six-month review hearing, the juvenile court may decide to provide additional reunification services and hold off on scheduling a section 366.26 hearing even without finding a substantial probability that the child can be returned to the parents by the 12-month review hearing. "At the six-month review, the court has discretion to continue the case and forebear from scheduling a [366].26 hearing even if it does not make the finding there is a substantial probability the child may be returned to his or her parent." (*Id*. at p. 179.)

This is in part because, while the court *must* continue the case to the 12-month hearing when it finds such a substantial probability,[3] it merely *may* schedule the section 366.26 hearing when it finds the parents have failed to participate and make progress in a court-ordered treatment plan.[4] (*M.V.*, *supra*, 167 Cal.App.4th at pp. 179-180.) In addition, the appellate court notes the difference in the "substantial probability" test between the six-month hearing and the 12-month hearing, which makes it easy for the

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[3] "If, however, the court finds there is a substantial probability that the child . . . may be returned to his or her parent or legal guardian within six months . . . the court *shall* continue the case to the 12-month permanency hearing." (§ 366.21, subd. (e), italics added.)

[4] If "the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan, the court *may* schedule a hearing pursuant to [s]ection 366.26 within 120 days." (§ 366.21, subd. (e), italics added.)

juvenile court to "punt" to the 12-month hearing, but not to the 18-month hearing. Under section 366.21, subdivision (e), governing the six-month review, the juvenile court may continue the case for six months if it finds a substantial probability that the child "may be" returned to the parents within six months. Under section 366.21, subdivision (g)(1), which governs the 12-month review, the juvenile court may continue the case for six months only if it finds a substantial probability that the child "will be" returned within six months, and it may make the substantial probability finding only if it also finds the three factors set forth in subdivisions(g)(1)(a), (b), and (c) regarding regular contact with the child, progress in resolving the problems that led to the dependency, and demonstrated ability to complete the treatment plan and provide for the child's needs. (*M.V.*, *supra*, 167 Cal.App.4th at p.179, fn. 6.)

Here, the juvenile court did make the finding that there was a substantial probability that K.B. would be returned to the parents by the 12-month hearing. As set forth in *M.V.*, the court had discretion to continue the case to the 12-month hearing even without having made that finding. It appears reasonable to us, then, to simply review the reasons for the court's decision to continue the case and offer the parents six more months of reunification services, to determine whether the court abused its discretion in doing so and acted in K.B.'s best interest.

As the court noted, K.B. had been moved to a new foster home for medically fragile infants only thirteen days prior to the 6-month hearing. In addition, K.B. had a cleft palate that had not yet been repaired and required special feeding equipment, she had been referred to a "craniofacial doctor as there is a little concern that the

circumference of her head is small," and had been referred to the Inland Regional Center to address concerns about her delayed development. Based on these factors, rather than on any real expectation that the parents would complete and benefit from their service plan, we believe the juvenile court acted within its discretion and in K.B.'s best interest when it declined to immediately terminate reunification services and go straight to the section 366.26 hearing. We believe, as did the juvenile court, that the newness of the placement and K.B.'s as-yet unresolved medical and developmental issues made it in K.B.'s best interest to delay the termination of reunification services and setting of the section 366.26 hearing until the court and DCFS could be more confident of K.B.'s chances of being adopted.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

MILLER
J.

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